

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1523

COMMONWEALTH

vs.

VINCENZO PORFINO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant was convicted of assault and battery on a family or household member in violation of G. L. c. 265, § 13M (a).¹ The defendant contends that the trial judge erred in her denials of the defendant's motions for a mistrial, and that portions of the prosecutor's closing argument were improper. We affirm the defendant's conviction.

Background. The defendant and the victim were married and shared a home with their children in Maynard. On May 7, 2017, the victim went out with some friends in downtown Maynard while the defendant napped at home. The defendant asked the victim to get him some "Xanax, Klonopin, or Suboxones" while she was out. When the defendant woke up, he started calling the victim by

¹ The jury acquitted the defendant of strangulation or suffocation under G. L. c. 265, § 15D (b).

phone repeatedly and asking where she was. When the victim returned home, the defendant was "livid" and the argument "got physical." The police arrived a few minutes after the incident and they photographed the victim's injuries.

Motions for mistrial. The defendant first contends that the judge erred in denying his motions for a mistrial, claiming the jury were exposed to prejudicial testimony regarding the defendant's prior bad acts that could not be remedied with curative instructions.

Before trial, the defendant filed motions in limine to preclude the Commonwealth's witnesses from mentioning the issuance of a restraining order against the defendant, "any arrest of or charge against the [d]efendant," and any "alleged behavior of the defendant as it relates to uncharged misconduct." The motions were allowed by agreement.

When questioned about the timing and duration of the incident on cross-examination, the victim responded that "the whole [incident] -- my house to it being done and doing the restraining orders and all that, it took the whole day" (emphasis added). After defense counsel unsuccessfully moved for a mistrial, the judge immediately struck the victim's answer in its entirety, and instructed the jury to "disregard" it, "not consider it any way, and remove it" from their minds.

Later during the direct examination of one of the responding officers, the officer mentioned in passing that he knew the defendant "through previous calls." The officer did not give any specifics about the previous calls, nor did he indicate whether the defendant was the reason for the calls. The judge immediately struck the officer's statement from the record and, after a brief sidebar discussion where defense counsel unsuccessfully moved for a mistrial, the judge promptly provided a curative instruction.²

During final instructions, the judge reiterated that the jury were not to consider any answers that she struck from the record.

"We review the denial of a motion for a mistrial for abuse of discretion." Commonwealth v. Silva, 93 Mass. App. Ct. 609, 614 (2018). There is no abuse of discretion merely because we may have reached a different result, id.; the test is whether the "judge made 'a clear error of judgment in weighing' the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives."

Commonwealth v. Bryan, 476 Mass. 351, 356-357 (2017), quoting L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

² "Members of the jury, I would like to instruct you that the [officer's] answer . . . to the last question is struck from the record, and you are to disregard it, not consider it and put it out of your mind."

"Further, '[w]hen a jury have been exposed to inadmissible evidence, the judge may rely on a curative instruction to correct any error and to remedy any prejudice.'" Silva, 93 Mass. App. Ct. at 614, quoting Commonwealth v. Durand, 475 Mass. 657, 668 (2016). "This is because '[a] trial judge is in the best position to determine whether a mistrial, an extreme measure available to a trial judge to address error, is necessary, or whether a less dramatic measure, such as a curative instruction, is adequate.'" Commonwealth v. Santana, 477 Mass. 610, 626 (2017), quoting Commonwealth v. Amran, 471 Mass. 354, 360 (2015). Where a witness's reference to inadmissible prior bad act evidence is "fleeting and vague" and a judge's response is "immediate and strong," there is generally no abuse of discretion in denying a defendant's motion for a mistrial. Commonwealth v. Baptista, 86 Mass. App. Ct. 28, 32 (2014).

We discern no abuse of discretion in the denials of the motions for mistrial here. Though the jury were exposed to inadmissible evidence, the references to the restraining order and the prior calls were "fleeting and vague." Baptista, 86 Mass. App. Ct. at 32. The judge's response was "immediate and strong," as she provided clear and forceful curative instructions. Id. Accordingly, the judge did not abuse her discretion by denying the defendant's motions for a mistrial.

Closing argument. The defendant next contends that the prosecutor's closing argument was improper because it impermissibly described the victim's injuries as "fresh," and misstated evidence by suggesting that the defendant's statements to police were inconsistent with his trial testimony.

"As the defendant objected to" both parts of "the prosecutor's argument, we review for prejudicial error."

Commonwealth v. Lugo, 89 Mass. App. Ct. 229, 234 (2016).

"Remarks made during closing arguments are considered in context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury." Id. at 233, quoting

Commonwealth v. Whitman, 453 Mass. 331, 343 (2009). "A

'prosecutor is entitled to argue the evidence and fair inferences to be drawn therefrom.'" Commonwealth v. Deane, 458 Mass. 43, 55-56 (2010), quoting Commonwealth v. Paradise, 405 Mass. 141, 152 (1989). "Those inferences need only be reasonable and possible." Commonwealth v. Roy, 464 Mass. 818, 829 (2013).

Here, the prosecutor described the victim's injuries as "fresh" during her closing argument, despite the judge's prior allowance of the defendant's motion in limine "preclud[ing] the Commonwealth's witnesses from opining that any alleged marks on the alleged victim [we]re 'very fresh' or 'fresh'" (emphasis added). The prosecutor's argument that the victim's injuries

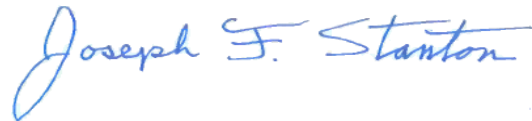
were "fresh" was a fair inference based on police testimony that the victim had open, red cuts with loose skin, and based on the photographs of those injuries taken fifteen to twenty minutes after the police arrived. See Deane, 458 Mass. at 55-56. Moreover, the judge's final instructions to the jury clearly indicated that closing arguments are not evidence. See Whitman, 453 Mass. at 343. Therefore, the prosecutor's closing argument was not improper. See id. at 343-346.

The prosecutor also permissibly commented on omissions from the defendant's pretrial statement and inconsistencies between that statement and his trial testimony. See, e.g., Commonwealth v. Almeida, 479 Mass. 562, 569-571 (2018); Commonwealth v. Martino, 412 Mass. 267, 283 (1992). See also Mass. G. Evid. § 613(a) (2019). At trial, the defendant claimed that the victim was the first aggressor. The prosecutor's cross-examination highlighted inconsistencies between this testimony and what the defendant told the police after the incident. Although the defendant testified that the victim's friend had to hold the victim back from attacking the defendant and that the victim had thrown a lighter at the defendant, the defendant could not recall whether he told the police any of these alleged details. Moreover, the officer's testimony recounting what the defendant told the police did not include any of these alleged details. The jury accordingly could have concluded that the

defendant did not provide those details to the police. If the defendant's trial version of events was accurate, "it is reasonable to infer that the time the defendant would have made this [version] known was when the defendant made his statement to the police."³ Almeida, 479 Mass. at 571. Thus, "it was not improper for the prosecutor to comment on th[ese] significant omission[s] and draw the jury's attention to these inconsistencies, especially given the theory that the defense presented." Id.

Judgment affirmed.

By the Court (Green, C.J.,
Maldonado & Hand, JJ.⁴),



Clerk

Entered: August 6, 2019.

³ The defendant spoke freely to the police in his home, as he allegedly believed they were there to arrest the victim. Therefore, "[t]he defendant's claim that the prosecutor's remarks impermissibly infringed on his right to remain silent fails for the simple reason that the defendant did not exercise his right to remain silent." Martino, 412 Mass. at 283.

⁴ The panelists are listed in order of seniority.